SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2016 0230

PETER STANLEY GANT — Applicant

v

THE QUEEN — Respondent

S APCR 2016 0231

MOHAMED AMAN SIDDIQUE — Applicant

v

THE QUEEN — Respondent

JUDGES:	WEINBERG, PRIEST and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	27 April 2017
DATE OF ORDERS:	27 April 2017
DATE OF REASONS:	8 May 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 104
JUDGMENT APPEALED FROM:	*R v Gant* (Unreported, Supreme Court of Victoria, Croucher J, 4–8, 11–15, 18–22, 26–29 April, 2–6, 9–12 May 2016)

CRIMINAL LAW – Appeal – Conviction – Unreasonable verdict – Obtaining financial advantage by deception (2 counts), attempting to obtain financial advantage by deception (1 count) – Circumstantial case – Sale of allegedly fake Brett Whiteley paintings pursuant to joint criminal enterprise – Judge gave invitation to jury in accordance with *R v Prasad* (1979) 23 SASR 161 – Jury rejected invitation and entered verdicts of guilty – Appeals conceded by Crown – Whether jury must have entertained reasonable doubt regarding applicants' guilt – Whether inference of guilt only reasonable inference available on evidence – *R v Baden-Clay* (2016) 90 ALJR 1013, 1020–1 [46]–[48], 1023–4 [65]–[66], referred to – Appeals allowed.

APPEARANCES:	Counsel	Solicitors
For the Applicant in S APCR 2016 0230	Mr T E Wraight QC with Ms F H Todd	Stary Norton Halphen
For the Applicant in S APCR 2016 0231	Mr R van de Wiel QC with Mr J A Ribbands	James Dowsley & Associates Pty Ltd
For the Respondent	Mr D D Gurvich QC with Mr J Gullaci	Mr J Cain, Solicitor for Public Prosecutions

WEINBERG JA
PRIEST JA
McLEISH JA:

1 After a five week trial, the applicants, Peter Stanley Gant and Mohamed Aman Siddique, were each convicted on two charges of obtaining a financial advantage by deception[1] and one charge of attempting to obtain a financial advantage by deception.[2] Gant was sentenced to a total of 5 years' imprisonment, with a non-parole period of 2 years and 6 months. Siddique was sentenced to a total of 3 years' imprisonment, of which all but 10 months was suspended. Each sought leave to appeal on the ground that the verdict of the jury was unreasonable or could not be supported having regard to the evidence.[3]

2 Late in the afternoon of the day before the hearing of the applications, the Director of Public Prosecutions informed the Court, with conspicuous fairness, that he would concede the ground of each appeal.[4] For the reasons that follow, we accepted that concession (which reflected the provisional view to which each of us had come before the hearing), quashed the convictions and ordered that verdicts of acquittal be entered for each applicant.

1 See *Crimes Act 1958* s 82(1).

2 See ibid ss 82(1), 321M.

3 See *Criminal Procedure Act 2009* s 276(1)(a).

4 We observed at the hearing that, while the concession was of course welcome, its late timing was a matter of considerable regret.

The Crown case

3 The Crown case, in broad terms, was that Gant and Siddique had embarked on a joint criminal enterprise during 2007 to create three paintings — *Blue Lavender Bay*, *Through the Window, Lavender Bay* and *Orange Lavender Bay* — in the style of the famous Australian artist Brett Whiteley, who died in 1992. It was alleged that they intended to sell the forgeries under the pretence that they were original works of Whiteley. Siddique, an accomplished art conservator who worked at a studio in Collingwood, would produce the paintings, while Gant, a well-known art dealer, would approach potential buyers and sell the paintings as though they were authentic Whiteleys.

4 Initially, five charges were laid: the three mentioned above, and two against Gant alone, concerning further dealings with two of the three paintings. The judge ruled that there was no case to answer in respect of charge 4 and severed charge 5 from the indictment. Accordingly, these applications for leave to appeal are concerned only with charges 1 to 3.

5 It is necessary to outline the evidence relied on by the Crown in support of its circumstantial case.

Purchasing an authentic Whiteley

6 Gant bought an authentic Whiteley work, *View from the Sitting Room Window, Lavender Bay*, at auction in March 2007. The Crown contended that it was around this time that Gant and Siddique entered into the agreement to produce fake Whiteleys and sell them as authentic. *View from the Sitting Room Window, Lavender Bay* was to serve as a 'template' from which Siddique would produce the three fake paintings. The painting was delivered to Siddique's studio in Collingwood on 19 April 2007.

7 The Crown relied on the evidence of Jud Wimhurst, a former employee of Siddique who worked at his studio. Wimhurst gave evidence that he was at lunch with Gant

and Siddique when they told him that they had both gone to Sydney to purchase the painting for a client.

Assembling the materials

8 In July 2007, Siddique purchased four doors with clean faces. It was alleged that the doors were purchased to create the forged paintings, because Brett Whiteley used doors of the type purchased for his paintings. Of the four doors, the Crown contended that three were consistent with *Blue Lavender Bay*, *Through the Window, Lavender Bay* and *Orange Lavender Bay* by reason of their size and also because there was evidence from Richard Grabsch, the managing director of the company that manufactured the doors, that there were markings and ventilation holes on the three paintings consistent with the kinds of markings and holes on doors his company produced.

9 Wimhurst gave evidence that when he saw the doors in the studio he asked Siddique what they were for. Siddique replied that the doors belonged to Gant and were for his home. Wimhurst joked that Gant must have had a house for small people. This was because one of the doors (which did not match the dimensions of any of the three paintings) was just 1.5 metres high and 1.2 metres wide. The Crown contended that Siddique's explanation that the doors belonged to Gant was unnecessary, and could be explained by the fact that Gant did in fact have some relationship to the doors — namely, the joint criminal enterprise that the Crown alleged.

10 In August 2008, Siddique placed an order for 10 more doors. The Crown contended he had the same purpose in mind as with the first four doors. One of these 10 doors had dimensions matching *Through the Window, Lavender Bay*.

11 During the same period, three frames were purchased by Siddique from Antonio Rincon. Between 1996 and 2000, Rincon had worked under the tutelage of Brett Lichtenstein, a framer who used to create frames for Brett Whiteley. He gave evidence that Lichtenstein made water-gilded frames for Whiteley and that Lichtenstein had taught him how to make those frames.

12 Rincon gave evidence, supported by invoices, that Siddique had ordered three water-gilded frames from him in November 2007, January 2009 and April 2009 respectively. He identified the frame on *Blue Lavender Bay* as one of the frames that he had manufactured, albeit he said that the black inner frame on that painting was bigger than those that he produced.[5] The dimensions of the frame purchased in January 2009, as described in the invoice, matched approximately the dimensions of *Through the Window, Lavender Bay*. And the frame purchased in April 2009 matched approximately the dimensions of *Orange Lavender Bay*. However, Rincon denied that the frame on *Orange Lavender Bay* was one of his frames, while agreeing it was in the style of a Lichtenstein frame.

13 The purchase of these doors and frames during the period when the work in Siddique's storeroom described below was progressing, the Crown submitted, supported an inference that the paintings that were sold or offered for sale as genuine Whiteleys were not authentic.

14 That inference was supported, too, by the evidence of Lichtenstein. He stated that whenever he created a frame for Brett Whiteley, he would also install the frame himself. By contrast, Rincon was not asked to frame the paintings. Presumably, on the Crown case, this was because he might have asked questions about the provenance of the paintings.

Possible forgeries come to light

15 Wimhurst gave evidence that in the upstairs part of Siddique's studio there was a locked storage area. A few weeks after the doors had been delivered to the studio, he noticed that the storage area was unlocked so he looked inside. He described seeing several Brett Whiteley paintings in incomplete form. They were past the stage of underdrawing[6] and had some paint on them. Wimhurst later told Guy Morel, an art conservator who also worked at the studio, what he had seen.

[5] The painting was covered when he identified the frame.

[6] Preliminary sketches drawn by the artist as a rough guide.

16 Morel gave evidence that he initially had a key to the locked storage room, but that Siddique took the key from him in 2005 or 2006. After having been told by Wimhurst of the paintings in the locked storeroom, Morel decided to take photographs of them. He was able to do so despite the room being locked because the room's walls did not reach to the ceiling. He was able to place a chair on a bench, stand on the chair and reach his arm over the partition to take photos. On a later occasion when the key to the room had been left in the lock, he also took two photos from inside the room, as well as some photos of doors in the downstairs foyer of the studio.

17 The Crown relied on the photographs taken by Morel. The photographs were said to depict *Blue Lavender Bay* (between 11 and 24 October 2007), *Through the Window, Lavender Bay* (between 26 February and 13 August 2009) and *Orange Lavender Bay* (between 19 October and 15 December 2008) in various stages of completion, as well as the authentic *View from the Sitting Room Window, Lavender Bay* and books displaying images of authentic Whiteley works.

18 Morel subsequently spoke to Detective Sergeant James MacDonald regarding the possible forgery of Brett Whiteley paintings. In October 2007, MacDonald attended the studio and saw a painting showing Sydney Harbour through a window and a blue painting of Sydney Harbour in the style of a Whiteley. A few weeks later, MacDonald again attended the studio on the occasion when Morel had found the key in the lock.

Selling the paintings

19 On the Crown case, it fell to Gant to sell the three paintings. He was successful in doing so with respect to two of the paintings and, it was alleged, had attempted unsuccessfully to sell the third.

20 *Blue Lavender Bay* was sold for $2.5 million. Gant contacted a Melbourne art dealer, Anita Archer. He told her that a client of his, Robert Le Tet, was interested in selling

a painting that he had commissioned directly through Christian Quintas, Brett Whiteley's former manager. Le Tet is a well-known art collector.

21 Archer sought to view the painting. Gant arranged a viewing at Le Tet's office in South Melbourne, although neither Gant nor Le Tet was present. Archer sent Lichtenstein photos of the painting. She gave evidence that Lichtenstein confirmed that he knew the painting and that it had one of his frames. Given this evidence, together with Le Tet's prominence as an art collector, she was satisfied of the provenance of the painting. She passed on photographs of the painting together with the details of its provenance (which Gant had supplied) to her client, Andrew Pridham, who decided to purchase it.

22 Lichtenstein also gave evidence about *Blue Lavender Bay*. He agreed that Archer contacted him seeking to confirm that he had framed it. Contrary to Archer's evidence, Lichtenstein said that he told her that he did not recognise the painting and that he would need to physically see it to confirm that he had framed it. He also said that he later told Wendy Whiteley, the former wife of the artist,[7] that he did not know *Blue Lavender Bay*. He was asked to view *Blue Lavender Bay* by Vanessa Kowalski at the Grimwade Centre for Cultural Materials Conservation at the University of Melbourne in November 2011. Lichtenstein said that he thought the frame on it was 'quite recent', perhaps less than five years old, having regard to the colour of the timber and the fact that it did not show much oxidisation or moisture build-up.

23 In April 2008, Wendy Whiteley visited Pridham. Her evidence was that after she saw *Blue Lavender Bay* she told Pridham that she was 'not comfortable with it'. Thereafter, Pridham contacted Archer stating that Wendy wanted to speak to her about Le Tet. Mrs Whiteley contacted Archer and stated that she had issues with the quality of the painting; that if it was authentic it was a 'bad hair day Whiteley'.

[7] Mrs Whiteley and Brett Whiteley were separated at the time that the three paintings in question were said by the defence to have been created.

24 Accordingly, Archer sought evidence of the painting's provenance. She contacted Lichtenstein seeking receipts for the framing of the painting, but Lichtenstein no longer retained any such records. Archer also pressed Gant for further evidence of provenance in the form of a signed statement from Le Tet. Gant provided an undated document, allegedly signed by Le Tet, which Archer passed on to Wendy Whiteley.

25 Le Tet denied signing this document. Correspondence was tendered in which Gant's solicitors acknowledged that 'the letter purportedly signed by you which refers to your purported ownership of a Brett Whiteley work was neither written by you nor signed by you'. Le Tet also emailed Archer, stating that he was unable to find records confirming a transaction in respect of *Blue Lavender Bay*.

26 Archer arranged on Pridham's behalf for *Blue Lavender Bay* to be looked at by academics at the University of Melbourne. Shortly thereafter, Pridham was refunded the $2.5 million in full.

27 *Through the Window, Lavender Bay* was not sold — it was the subject of charge 2 on the indictment, being the attempt charge. Gant again contacted Archer in November 2009 seeking to sell another Whiteley painting. Gant gave her a photograph of the painting together with a history of its provenance. Again, it was said that the painting was commissioned directly from Quintas. The painting was then said to have been on-sold to a private collection in Sydney. Archer emailed Ralph Hobbs, an art dealer at a Sydney gallery called Art Equity, with this information and offered to sell it to him for $950,000. Hobbs elected not to purchase the painting. Upon inspecting it he thought it was 'very anaemic or flat' and that it 'didn't feel right'. Further, he said he was unable to satisfy himself of the provenance of the paining, and so sent it back to Archer.

28 Archer consulted Wendy Whiteley about *Through the Window, Lavender Bay*. Wendy Whiteley was emphatic in her evidence-in-chief when asked what she said to Archer:

'Anita you have to be joking. Go back to art school. If you don't see that this is the first fake I've seen in my life, basically, then you need to go back to art school'.

29 *Orange Lavender Bay* was sold for $1.1 million to SNX Pty Ltd, a company affiliated with Steven Nasteski. Gant had engaged John Playfoot, an art dealer, to sell *Orange Lavender Bay*. Andrew Crawford, an art dealer engaged by Nasteski to source art for him, knew that Playfoot had a Whiteley painting on the market, so he contacted Playfoot to obtain an image of the work. SNX Pty Ltd entered into an agreement to purchase the painting soon thereafter and a deposit was paid to Playfoot.

30 The painting was later delivered to Crawford's gallery. Nasteski attended the gallery and viewed the painting himself. He transferred a further sum to Playfoot. However, Crawford, upon viewing the painting, began to question its authenticity; in evidence-in-chief, he stated that, based on his 'gut instinct' and his experience based on the 'hundreds, if not thousands' of Whiteley paintings that he'd seen over the years, the painting 'just didn't feel right'. Feeling uneasy about the provenance of the work, Crawford spoke to Wendy Whiteley and asked her to view the painting. According to Crawford, on that occasion Wendy Whiteley used the phrase 'bad hair day' to describe the painting, as she had with respect to *Blue Lavender Bay*. In examination-in-chief, Wendy Whiteley said that she said to Crawford 'it's a fake. It's definitely a fake'.

31 Crawford told Nasteski this and advised him not to proceed with the purchase. Nasteski, apparently satisfied of the work's authenticity, transferred a further portion of the purchase price to Playfoot.

32 Crawford sought evidence from Playfoot of *Orange Lavender Bay*'s provenance. Crawford gave evidence that Playfoot had implied that the owner of the painting was Le Tet. Playfoot later provided a letter stating that he knew the seller, who had owned the work for more than 20 years. He also provided a consignment note from Gant, dated 1988 and listing *Blue Lavender Bay*, *Through the Window, Lavender Bay* and *Orange Lavender Bay* as having been received from Quintas. As explained further

below, the Crown submitted that the consignment note itself was real but that the details of the three works had somehow been added later.[8] Playfoot also provided an art catalogue entitled 'A Private Affair', dated 8 November 1989, in which *Orange Lavender Bay* appears.

33 As also explained below, the Crown contended that this catalogue was created at some later time.[9] Nasteski gave evidence that he subsequently had the catalogue examined and that it was found to be a digital print that could not have been produced in 1989. In cross-examination he denied that Playfoot had told him that Gant had given him only a copy of the catalogue, rather than an original. The Crown also relied on evidence of Luke Doyle, a librarian at the National Gallery of Victoria ('NGV') who was unable to find a copy of the catalogue 'A Private Affair' in the NGV's archives or via any similar archive in Australia. While the NGV did not solicit catalogues, it regularly received them and kept them in its archives for the purposes of provenance research. Doyle also stated that all catalogues held by the NGV in respect of exhibitions at Gant's gallery were for single artist exhibitions. The 'A Private Affair' catalogue, by contrast, exhibited several artists' works. Wendy Whiteley also gave evidence that she had never seen the catalogue before.

34 After these documents were provided to him, Nasteski paid the remainder of the purchase price to Playfoot.

35 Lichtenstein gave evidence that Nasteski asked him to attend his house to look at *Orange Lavender Bay*. Lichtenstein stated that he hadn't made the frame for that painting, having regard to what he called 'slight differences in … how it was made'. For instance, he typically placed perspex on Whiteley paintings because they were unvarnished. Lichtenstein also gave evidence that he spoke to Wendy Whiteley regarding the painting. She conveyed her opinion that it was 'a fake'.

36 Nasteski later sought to sell the painting. Concerns about its authenticity led to it, too, being sent to the University of Melbourne for analysis.

8 See [59] below.

9 See [62] below.

37 It will be noted that the sales involved Gant alone. It will also be noted that the chronology of the sales (in particular, the sale of *Blue Lavender Bay*) overlapped and corresponded with the chronology of the creation of the paintings. It was contended by the Crown that, together with the evidence of the discussion about the purchase of *View from the Sitting Room Window, Lavender Bay* and Siddique's reference to the first delivery of doors being for Gant, this demonstrated that Gant and Siddique were working pursuant to a joint criminal enterprise, rather than Gant going on to sell the paintings without Siddique's knowledge.

Expert evidence

38 The Crown relied on an analysis by Associate Professor Robyn Sloggett and Vanessa Kowalski of the University of Melbourne, whom it called as expert witnesses. As mentioned, Pridham and Nasteski questioned the authenticity of *Blue Lavender Bay* and *Orange Lavender Bay* respectively. They provided the paintings to Sloggett and Kowalski for them to examine. Sloggett and Kowalski's evidence was that there were inconsistencies between *Blue Lavender Bay* and *Orange Lavender Bay* and known works of Brett Whiteley. Both stated that the paintings could not be positively attributed to the oeuvre of Brett Whiteley.

39 In examination-in-chief, Sloggett stated that there was not enough evidence to ascribe *Blue Lavender Bay* or *Orange Lavender Bay* to the oeuvre of Brett Whiteley. She stated that the following passage in her and Kowalski's report on *Blue Lavender Bay* still held true:

> This work cannot therefore, on the evidence available, in particular on the basis of the lack of points of identification with materials and techniques known to be used by Whiteley and in the absence of any verifiable provenance that links the work to Whiteley, be attributed to the oeuvre … of Brett Whiteley. The evidence suggests rather that this work has not been produced by Whiteley.

40 In support of this conclusion, Sloggett pointed to several disconformities between *Blue Lavender Bay* and *Orange Lavender Bay*, and securely provenanced Whiteleys. In depicting water, Whiteley had a particular style: he would portray currents, and would 'slash across' the water with another form. By contrast, the water in *Orange Lavender Bay* was 'much flatter' than Whiteley's known works; it was 'simply an orange background on which these images have been put'. The boats in *Orange Lavender Bay* were 'almost paint by numbers', whereas Whiteley would not draw an outline and then fill it in. The painting did not convey the sense of space that one typically got from Whiteley's works; again, Sloggett used the adjective 'flat' to describe one of the trees in *Orange Lavender Bay*. The birds in *Orange Lavender Bay* looked as though they were drawn by a child, whereas Whiteley was very well-known for his depictions of birds.

41 Kowalski added that Whiteley's paintings depicted a 'complex build-up of paint', rather than the unmixed blue in *Blue Lavender Bay*.

42 In Sloggett's view, much the same could be said of *Blue Lavender Bay*. The birds did not mesh with how Whiteley usually painted them. The birds in *Blue Lavender Bay* had none of the 'velocity or fineness' associated with Whiteley's birds. The motifs deployed by Whiteley — jetties, piers, the Sydney Harbour Bridge — were all present, but were painted differently. It was as though it had been painted by a 'dead hand'.

43 There was also evidence of infrared reflectography images of *Blue Lavender Bay* and *Orange Lavender Bay* taken by Sloggett and Kowalski showing underdrawings said by the Crown to match the underdrawings that could be seen on the photos taken by Morel at Siddique's studio.[10]

44 Wendy Whiteley gave evidence about several matters. She stated that Brett Whiteley did not underdraw, before clarifying that he did not do underdrawings in his Lavender Bay series. Evidence was led that, while she and Whiteley had separated

[10] There were some underdrawings that did not make it into the finished artwork.

in 1987 and she was living in London while he was in Sydney, in 1988 — when the three paintings were allegedly produced — they still communicated once or twice a week. She said he never told her of any Lavender Bay paintings that he was producing in 1988.

45 In relation to *Orange Lavender Bay*, she stated that it lacked spontaneity, wit and spirit; 'it was heavy, wooden'. It looked as though it had been traced and knitted together badly.

Dealings with police

46 In March 2014, search warrants were executed in respect of Siddique's studio and his home. Detective Senior Constable Justin Stefanec, the informant, found pieces of gold frame at the studio, but no Whiteley-style paintings were located at either address.

47 The next day, Gant was taken to the police station for a record of interview. After the interview was conducted, Stefanec searched Gant's home address with his consent but found no catalogues, nor any paintings, fitting the description of the three at issue in this case. Gant was interviewed a second time approximately a month later.

48 The Crown sought to derive from the interview evidence that Gant knew enough about Whiteley and his work to have produced the fake paintings. He knew of Whiteley's heroin addiction and about Quintas. He knew when Brett Whiteley and Wendy Whiteley separated. And he knew that Whiteley works had gilded gold frames. Additionally, he demonstrated contempt for Australian art collectors. This was said to give insight into Gant's attitude towards the art world.

49 Gant denied that the paintings that were sold or offered for sale were 'fakes'. When it was suggested that *View from the Sitting Room Window, Lavender Bay* was the 'template' from which the three paintings were created in Siddique's Collingwood studio, he offered no comment. He stated that he had purchased the three paintings in the late 1980s from Brett Whiteley, through his agent Quintas. He stated that he

could confirm the details of the paintings from his consignment book. He made reference to the paintings being depicted in a catalogue for an exhibition that ultimately did not take place due to the death of his business partner. Gant said he was happy to provide both documents to the police.

50 He declined to answer questions regarding what had happened to the paintings between his purchasing them and their re-emergence on the market some 20 years later, except to say that for some but not all of that period they had been in his possession. He stated that *Blue Lavender Bay* had been displayed at his gallery in about 2000, and that it had been in storage at Le Tet's office.

51 Gant said that *View from the Sitting Room Window, Lavender Bay* may have been transported to Siddique for cleaning, but that otherwise it was held at Le Tet's office in South Melbourne as security because he had purchased it using funds loaned to him by Le Tet.

52 Gant declined to answer questions regarding where the proceeds of sale of *Blue Lavender Bay* went, but he admitted receiving $2.1 million from Archer in respect of that work. He also admitted receiving $1 million from Playfoot in respect of *Orange Lavender Bay*.

53 Gant was shown a document that he identified as a copy of the 'A Private Affair' catalogue. He explained that the document was the one he had given Playfoot to pass on to Nasteski. In response to a suggestion from Stefanec that it could not have been produced in 1988 due to the printing method used, Gant stated that it was a copy, and that he had told Playfoot that when it was provided.

54 In relation to the written statement that Le Tet owned *Blue Lavender Bay*, Gant explained that Le Tet was in substance the owner because he left it at Le Tet's office as collateral for money that he owed Le Tet. He later stated that he 'led [Archer] to believe' that Le Tet was the owner because he didn't 'want everybody knowing what [he] happen[ed] to own or [not] own or have an interest in'. He also stated that at

some stage Le Tet held the painting in his Sydney office, for the company Marmalade Films.

55 Gant also suggested that the reason for these paintings not having some of the hallmarks of Whiteley's Lavender Bay series was that his earlier Lavender Bay paintings were painted because Whiteley wanted to, whereas some of his later ones were painted only because someone asked him to paint a Lavender Bay for sale.

56 Siddique's record of interview was not tendered.

The defence case

57 The defence contended that there was no joint criminal enterprise of the kind alleged, and that the paintings that were sold or offered for sale were themselves authentic. It was contended that Gant had obtained the three paintings directly from Whiteley, through Quintas, and that in 2007 to 2009 Siddique was merely painting copies of those paintings, as he was perfectly entitled to do. They did not pass off those copies as Whiteleys; rather, Gant sold, or sought to sell, the originals. Copying authentic Whiteley paintings, as Siddique had done, was not, without more, a crime. In support of those central propositions, the defence relied on several pieces of evidence.

58 The Crown had led evidence from Rosemary Milburn, a gallery assistant who worked at Gant's gallery between 1988 and 1989, that strongly supported the defence case that the paintings existed in 1988. Milburn was shown a consignment book which was used to note when artworks were coming into and going out of the gallery. She was shown a page which recorded the delivery of paintings described as '*Big Blue Lavender Bay*', '*Orange Lavender Bay*' and '*Lavender Bay through the Window*' in June 1988. The page accurately recorded the dimensions of the three paintings. Milburn confirmed that it was her handwriting, and her signature, that appeared on the page. She said that she recalled that there were three Brett Whiteley paintings that came in from Quintas at that time. She remembered that the three works depicted Sydney Harbour and that they were blue, lavender and orange. The

defence acknowledged that she was wrong about one painting being lavender in colour but contended that the thrust of her evidence was wholly consistent with the defence case. The defence pointed out that the Crown made no application, as it might have done, to cross-examine Milburn about the entry in the consignment book, and did not seek to challenge her, in the witness box, as to her evidence that it had been made by her, and was a contemporaneous record of receipt of the works specified. Nor, it seemed, had the Crown sought to undertake any forensic testing, or examination of the consignment book with a view to challenging the authenticity of the entry.

59 In its closing address the Crown pointed to incongruities in the consignment note. The first line of the note read '1 Brett Whiteley'. On the next line appeared the words 'Big Blue Lavender Bay', followed by its dimensions. Then there was '2 Orange Lavender Bay' and '3 Lavender Bay through the Window' and their respective dimensions. The prosecutor submitted that the consignment note had initially recorded receipt of one Brett Whiteley painting (hence '1 Brett Whiteley'), and that under the 'power of suggestion' Milburn had accepted that she had written the remainder of what appeared in the note. She suggested to the jury that Milburn, though fully accepted as an honest witness, must somehow have been mistaken in confirming the note's authenticity. She pointed to the fact that, when Milburn was shown images of the three paintings by Stefanec, she had been unable to say whether they were, in fact, the paintings referred to in the consignment note. Milburn had not seen the consignment note in over 25 years. But, as the defence pointed out, the Crown did not put to Milburn that she was, or may have been, mistaken.[11] The

[11] Before calling Milburn, the Crown stated that it was considering whether to make an application under s 38 of the *Evidence Act 2008* to cross-examine her on the basis that she was an unfavourable witness. Ultimately, and for reasons that are not apparent, no such application was made.

judge therefore gave the jury a *Browne v Dunn*[12] direction when dealing with her evidence in his charge.

60 Jeremy James's evidence in relation to the 'A Private Affair' catalogue also provided powerful support for the defence case. In 1989, James was working at a printing business run by his father, Kenneth James Printing. He recalled printing a catalogue for Peter Gant between 1988 and 1989 that featured multiple artists. He also took photographs of paintings for inclusion in the catalogue. He recalled that he photographed a blue Whiteley and an orange one, both from the Lavender Bay series, although only the orange ultimately appeared in the catalogue. He stated that he had photographed them both at Le Tet's office in South Melbourne. He agreed when it was put to him that the name of Le Tet's assistant, who was present when he took the photographs, was 'Heather'. This was correct — her name was Heather O'Brien. James identified the paintings in the courtroom, namely *Blue Lavender Bay* and *Orange Lavender Bay*, as those which he had photographed at that time.

61 James gave evidence that there was a 'running proof' of the catalogue, whereby the document would be printed in parts and, after each part was printed, the client would be shown the proof to mark up with any changes. He was shown a document that he identified as the running proof for the 'A Private Affair' catalogue, marked with corrections in his handwriting. He also stated that the exhibition did not go ahead because of the death of Gant's business partner, Greg Korn.

62 As with Milburn, the Crown suggested to the jury that James was honest but mistaken in his recollection. Le Tet had said that he did not recall having had *Blue Lavender Bay* at his offices and had no record of having received it. James had stated that 'A Private Affair' was the only catalogue featuring a combination of artists that he had produced for Gant during 1988 and 1989, and that he had never worked with

[12] (1893) 6 R 67. *Browne v Dunn* is a rule of fairness which requires that, where a jury is invited not to believe a witness's evidence, the basis upon which it is invited to do so must be put to that witness, so that he or she may offer an explanation. Consistently with that rule, the judge directed the jury that they should assume that, had the basis upon which the Crown suggested that Milburn was mistaken been put to her, her answers would not have assisted the Crown.

the typesetter, Fred Roden, before. But an exhibit tendered during Doyle's evidence showed a catalogue that James had produced for Gant in 1988 that had been typeset by Roden's company. That catalogue showed an orange painting and a blue painting, both by Brett Whiteley albeit not of Lavender Bay and not even being landscapes. As with Milburn, the possibility that James was mistaken, and more particularly, the possibility that he was confusing 'A Private Affair' with the other 1988 catalogue, was not put to him.[13] The judge gave a *Browne v Dunn* direction in respect of these matters as well. Moreover, Gant's counsel noted that the other catalogue listed two photographers. As such, it was not even clear that James had been the person who had taken pictures of the two paintings in it to which the Crown had drawn the jury's attention.

63 The 'A Private Affair' catalogue was itself significant evidence upon which the defence relied as supporting its case that the paintings were created in 1988. The catalogue had been provided by Gant and Siddique to Morel, himself an expert in both printing and paper, for him to provide a report on it. Morel's report very fairly concluded that the catalogue was produced prior to 8 November 1989. The report also stated that the catalogue was printed in the lithographic offset method, an older method of printing, albeit, as Morel stated in cross-examination, one that is still in use today. In cross-examination, Morel gave evidence that he had consulted with other printing experts in the course of producing the report. Moreover, the defence pointed out that, as with the consignment book, the Crown seemingly had not sought to undertake any forensic examination of the catalogue that might contradict Morel's report.

64 In response, the Crown pointed to Morel's evidence-in-chief, where he stated that he drew the date in his report from the date on the catalogue itself and acknowledged that he had done no tests on the paper in an attempt to date it.

[13] Again, an application under s 38 of the *Evidence Act 2008* was foreshadowed but did not eventuate.

65 The defence explanation for the catalogue not being documented elsewhere (for instance, in the NGV's archives) was that the exhibition did not go ahead due to Korn's death.

66 The defence noted further that several of the artists whose work was displayed in the catalogue were listed in the consignment book. This showed that those works had been assembled around that time in order to form part of the planned exhibition.

67 The defence also pointed to Siddique's 'Framing and Arrivals' record book. That book showed a quote for cleaning and re-varnishing *Blue Lavender Bay* in 2006 — well before it was alleged to have been produced. Again, for whatever reason, the Crown did not seek to undertake forensic testing of the record book.

68 Gant admitted having provided the document said to be signed by Le Tet evidencing the provenance of *Blue Lavender Bay*. His counsel described it as nothing more than 'a storm in a teacup'. Gant had not been charged with making a false document. He sought to explain the document by reference to his relationship with Le Tet, pursuant to which Le Tet would lend him money to purchase art and for other projects. Security for the loan would often be provided in the form of a painting. In that sense, as Gant explained in his record of interview, there was an element of truth in the proposition that Le Tet owned the painting. Gant also pointed out that attaching Le Tet's name bolstered the provenance of the artwork. It was in the context of that 'complex' relationship with Le Tet that Gant had provided the document to Archer.

69 Moreover, Archer herself, who had had a long career in the field of art, was satisfied of the provenance of *Blue Lavender Bay* because, according to her, she had confirmation from Lichtenstein that he had framed it. In examination-in-chief, an email from Archer to Pridham was tendered in which she stated that the provenance of the painting was 'impeccable'. Archer explained in cross-examination that she researched the background of Whiteley's similar works and learnt about the market for such works in Australia. And she was aware that Whiteley had had paintings

commissioned directly through Quintas and knew that Le Tet was a prominent collector.

70 As for the evidence of Hobbs that he could not be satisfied of the provenance of *Through the Window, Lavender Bay*, the defence sought to suggest that he sent it back because he did not like it. In cross-examination, Hobbs said that, had he been satisfied of its provenance, the decision whether to purchase it would have come down to the question of price.

71 Siddique's counsel pointed out that there was no evidence of Siddique having ever received any financial reward for engaging in the alleged joint criminal enterprise. He also cast doubt on the Crown's use of the fact that Siddique had been in Sydney when *View from the Sitting Room Window, Lavender Bay* was purchased. It was suggested that Siddique was merely there to confirm that the painting was in good condition.

72 The purchase of the unquestionably authentic painting, *View from the Sitting Room Window, Lavender Bay*, was said to be consistent with the defence case. As senior counsel for Gant put it in his closing address, it was a 'great benefit' for someone copying a Whiteley to have a specimen that they could seek to emulate. The evidence adduced by the Crown did not rise so high as to demonstrate that any copying would be attended by attempts to pass off the copies as authentic Whiteleys.

73 As to Grabsch's evidence identifying the doors used for the three paintings on the basis of marks that appeared on them, in cross-examination he conceded that while the marks could have been applied by his company, he could not positively say that they had been. He also accepted that for doors of the type ordered by Siddique, it was common to add ventilation holes to alleviate moisture build-up and that the holes on *Blue Lavender Bay* and *Orange Lavender Bay* looked bigger than those his company would usually make.

74 The defence pointed to evidence elicited from Rincon in cross-examination that the frames did not match his method of producing water-gilded frames. Rincon gave

evidence that Lichtenstein's method of framing meant that if a painting needed to be re-framed, part of the Lichtenstein frame had to be destroyed. His alteration to the method Lichtenstein had taught him meant that it would not be necessary to destroy the frame in order to re-frame a painting.[14] As mentioned above, upon examining the frame of *Blue Lavender Bay* Rincon stated that the frame resembled his own style of framing, rather than Lichtenstein's. The defence contended that, if Gant and Siddique were trying to pass off the paintings, it was nonsensical to use a frame that was not in Brett Whiteley's preferred style. Rather, what had occurred was that an old Lichtenstein frame had been replaced with a (similar but different) frame produced by Rincon. This also explained the nail holes in the sides of *Blue Lavender Bay*: Lichtenstein's frames would often be nailed on. But in response, the Crown pointed to Archer's evidence in re-examination that she didn't recall whether the frame on *Blue Lavender Bay* resembled the Rincon or the Lichtenstein method of framing. This went to show that a purchaser, even aided by an art dealer, could not be expected to notice this subtle difference in framing method.

75 The defence contended that the third Rincon frame had gone to another (unquestionably authentic) Whiteley painting, *Baudelaire's Drive*. The Crown countered that, when it was put to Rincon that this third frame would fit *Baudelaire's Drive*, he said that the painting was too big. On the other hand, the Crown had not conducted an examination of *Baudelaire's Drive* or taken up Rincon's willingness to inspect its frame.

76 The defence also relied on Lichtenstein's evidence that he was not the only framer who worked for Brett Whiteley during the period when the three paintings were said by the defence to have been produced. There was evidence that Wolf Breitzmeier also framed Whiteley paintings, under the tutelage of Charles Hewitt. The back of *Blue Lavender Bay* had the number '2520' written on it. 2520 is the postcode for Wollongong, where Breitzmeier lived. The back of the painting also

[14] The Lichtenstein method, which involved a device known as a 'baguette', meant that the frame did not overlap onto the painting itself, whereas the Rincon method, which involved a 'slip' instead of a baguette, involved some overlap of the frame onto the painting. For present purposes, that suffices to explain the difference in methodology.

had the words 'Christian' and 'C Quintas' written on it, together with an address in Darlinghurst and a 7 digit phone number consistent with the Australian telephone numbering system in 1988. This was said to support the contention that the paintings were purchased directly from Whiteley, through Quintas. On the defence case, Quintas — who Wendy Whiteley confirmed lived in a flat in Darlinghurst in 1988 and 1989 — would have had *Blue Lavender Bay* transported to Breitzmeier for framing.

77 Further, Jonathan Hartley, a character witness for Siddique, gave evidence that he saw *Blue Lavender Bay* in the public area of Siddique's studio, where he took art lessons, on a number of occasions around 2005 or 2006. In cross-examination, he accepted that he might also have seen it around 2007 and that he was 'very vague' about the timing.

78 Breitzmeier was also said to have framed *Orange Lavender Bay*. Rincon had stated in cross-examination that *Orange Lavender Bay* was framed in the Lichtenstein style (albeit the inner frame was bigger than what Lichtenstein used) and that he did not produce it. But Lichtenstein also gave evidence that it was not one of his frames. On the defence case, Breitzmeier may well have framed it, given that it was part of a 'series' of Lavender Bay paintings Whiteley was producing around the same time.

79 On the back of *Orange Lavender Bay* were written the words 'Marmalade North Sydney'. Le Tet gave evidence that he had a company called Marmalade Films Pty Ltd. Its offices were in North Sydney, and it was registered between 1982 and 2001. This was said by the defence to be important evidence consistent with *Orange Lavender Bay* being purchased by Gant in the late 1980s pursuant to finance from Le Tet.

80 Further, according to Playfoot, several respected art dealers had expressed opinions that *Orange Lavender Bay* was brilliant. Tim Goodman, CEO of Sotheby's Australia, wanted to sell it. Georgina Pemberton, also of Sotheby's, had sought to sell it as well. Pemberton and David Cook, another Sotheby's employee, told Nasteski they

thought it was genuine. Either Chris Deutscher or Damian Hackett, who headed the auction house Deutscher and Hackett, had called Playfoot a 'lucky bastard' and described *Orange Lavender Bay* as a 'bloody cracker'. Indeed, Archer gave evidence that Deutscher told her he wanted to place the painting on the front cover of the Deutscher and Hackett catalogue.[15] Further, Lichtenstein gave evidence that Robin Gibson, a gallerist who had sold a lot of Whiteleys, described the painting as 'striking' and thought it was an original.

81 As to *Through the Window, Lavender Bay*, the defence pointed out that there was simply less evidence to support the Crown case than there was in respect of *Blue Lavender Bay* and *Orange Lavender Bay* as it had not been put in evidence or analysed by any experts.

82 Counsel for Siddique observed that in 2014 Siddique had telephoned Wimhurst regarding what Wimhurst had seen in the locked storage room in 2007. Wimhurst gave evidence that when he asked Siddique what he should do, Siddique replied that he should tell the truth, hardly the conduct of a fraudster.

83 Sloggett's evidence was attacked in cross-examination. The defence pointed to her and Kowalski's reports, which stated that comparison to known Whiteley paintings would provide a better understanding of how the works fitted within Whiteley's oeuvre. Sloggett explained that she and Kowalski looked at a range of Whiteley works, but accepted that they only looked at one known Whiteley painting from 1987 or 1988, when the paintings were allegedly produced. Further, in re-examination Sloggett stated that it was useful to compare the paintings to the artist's entire body of work. While it would be ideal to have a lot of paintings from the relevant period against which to compare *Blue Lavender Bay* and *Orange Lavender Bay*, that was not to say that other works from other periods were of no use.

84 It was put to Sloggett that it was documented that Whiteley paintings that were sometimes regarded as 'stiff' were produced while the artist was not on heroin.

[15] Archer stated that the front cover of the catalogue had 'the highest status'.

Lichtenstein had given evidence that some of the work produced by Whiteley when he was off drugs was 'tight'. Sloggett said that it was hard to generalise and that Whiteley had produced some acclaimed work while free of drugs.

85 Under questioning by the judge, Sloggett accepted that it wasn't possible to conclude definitely whether *Blue Lavender Bay* or *Orange Lavender Bay* were fakes. The exchange was as follows:

> So is the reality you just don't know, do you?---No, we don't. We don't know - - -
>
> Whether these are genuine or not, you don't?---Do we know if they are genuine? No, we know the evidence that would line up to have — to determine one way or the other.
>
> But you can't determine it definitively, can you?---It's not a yes or no answer. Yes. Sorry, sorry, not your — no, we cannot determine definitely because on the basis of the proposition you just put forward. It is possible in the world that there is evidence that will alter a conclusion. The basis for which a conclusion would be altered is how strong is that evidence to line up with the conclusion that you've drawn based on the — what the other evidence is ought to be.

86 Sloggett affirmed her statement at the committal hearing that the furthest her evidence could go would be to conclude that, on the evidence available, on the balance of probabilities the works could not be attributed to Brett Whiteley.

87 Moreover, in cross-examination emails were put to Sloggett in which she and James MacDonald of Victoria Police communicated regarding the alleged frauds prior to Sloggett and Kowalski finalising their reports, and in particular what 'tactics' might be pursued to prove that the paintings were fake. This communication was not disclosed in the reports. Sloggett denied that it needed to be disclosed because it

wasn't relevant. This was said by the defence to show that Sloggett and Kowalski were biased, and that their evidence should be rejected.

88 In terms of the methodology that Sloggett and Kowalski undertook, the defence pointed out that the paintings in the Lavender Bay series with which they compared *Blue Lavender Bay* and *Orange Lavender Bay* were painted many years before 1988 and 1989, when those paintings were said to have been produced. The last comparator painting was produced in 1978, a decade before the paintings in issue.

89 In cross-examination, Kowalski conceded that infrared photographs had not been taken of any of Brett Whiteley's other works by way of comparison. Moreover, there was no infrared photograph of the whole of the subject paintings. Such photography was confined to areas where particular underdrawings had been identified. Nor had any photogrammetry been undertaken, by which the photographs taken over the wall in Siddique's studio, which necessarily depicted the works at an angle, could be mapped onto a flat surface for comparison purposes.

90 Wendy Whiteley's evidence was strongly challenged. She was described by Gant's counsel as an 'advocate' for Brett Whiteley, rather than an expert. It was pointed out that at the time the paintings were said by the defence to have been made she was in London and was involved in a property dispute with Whiteley. As such, she would not have known what works he was creating.

91 Wendy Whiteley accepted that she had thought that another Lavender Bay painting with a window, similar to *Through the Window, Lavender Bay*, was not a genuine Whiteley until she was shown a 'sad' photograph of Whiteley standing next to the painting. The defence contended that this meant that her opinion as to the genuineness or otherwise of the Lavender Bay paintings was essentially worthless.

92 Her evidence that Whiteley never did underdrawings on Lavender Bays was challenged. A clip from a film produced in 1989 showed Whiteley doing underdrawings, albeit not on paintings from the Lavender Bay series.

93 Wendy Whiteley also stated that Whiteley's use of heroin was not conducive to creating great art. The defence relied on this to support the view that these paintings were created by Whiteley while he was under the influence of drugs. That explained the fact that they did not receive the critical acclaim of some of his other, better-known works.

94 Gant's record of interview was said by his counsel to be entirely consistent with the defence case, and with the evidence.

The conduct of the trial

95 After the Crown closed its case, the defence submitted that there was no case to answer in respect of all charges.[16] In the alternative, the defence asked the judge to give a *Prasad* invitation,[17] by which the jury would be invited to reach a verdict of not guilty without the need to hear further evidence or closing addresses.

96 These submissions were based principally on the consignment book, Morel's report on the 'A Private Affair' catalogue and the evidence of James and Milburn, the combined effect of which was to preclude the jury from rationally excluding the possibility that the three paintings were produced in 1988 or 1989. The defence also contended that the evidence elicited from Sloggett and Kowalski was not capable of sustaining the Crown case that the paintings were not authentic Whiteleys produced at that time. Counsel for Gant pointed to Sloggett accepting that she could only opine on the balance of probabilities whether the two paintings she and Kowalski examined were created by Brett Whiteley and that it was impossible to know whether the paintings were Whiteleys.

97 The Crown resisted the no case submission on the basis that Milburn and James, though acknowledged as honest witnesses, must have been mistaken in their recollection. They had been asked to give evidence as to events nearly 30 years ago,

[16] This extended also to charges 4 and 5. As mentioned above, in respect of charge 4 this submission succeeded whereas in respect of charge 5 the judge ordered that the charge be severed from the indictment.

[17] See *R v Prasad* (1979) 23 SASR 161.

and had only been asked to recall those events in recent years. However, the Crown did not oppose the giving of a *Prasad* invitation.

98 The judge rejected the submission that there was no case to answer, albeit 'by the barest of margins' and 'not without a great deal of hesitation'. He found that the case was 'a very weak [one], so weak in fact that it might lead to an unsafe verdict', but felt that he was nonetheless bound by the authorities to reject the no case submission.[18] However, the judge accepted the defence submission that a *Prasad* invitation should be given.

99 The jury declined the *Prasad* invitation. Gant called no witnesses; Siddique called two character witnesses, including Hartley (who also gave the evidence referred to of having seen *Blue Lavender Bay* in Siddique's studio). The defence then made a second submission that there was no case to answer, which the judge rejected, again 'by the barest of margins'. In the course of so ruling he stated his view that any convictions entered by the jury would be unsafe and liable to be overturned by the Court of Appeal.[19]

100 After the jury returned guilty verdicts, the judge sentenced the applicants and ordered stays of each sentence pending the hearing and determination of an application for bail before the Court of Appeal.[20] He did so principally on the basis that, in his view, there was a compelling argument that the jury's verdicts were unsafe, and therefore liable to be overturned by this Court.[21]

[18] He referred in particular to *Doney v The Queen* (1990) 171 CLR 207 and *Questions of Law Reserved on Acquittal [No 2 of 1993]* (1993) 61 SASR 1.

[19] His Honour reiterated that view in an unusually detailed and emphatic report to the Court of Appeal.

[20] See *Criminal Procedure Act 2009* s 309(2). The Court of Appeal granted each bail application: *Gant v The Queen* [2016] VSCA 340.

[21] *R v Gant* [2016] VSC 662 [199]–[206]. The judge also relied on evidence as to Siddique's 'fragile mental state', together with the Crown's concession that if Siddique's mental health formed part of the basis of ordering a stay in respect of Siddique's sentence then Gant's sentence should also be stayed: at [193], [207]–[208], [214].

The convictions were unsafe and unsatisfactory

101 Section 276(1)(a) of the *Criminal Procedure Act 2009* requires this Court to allow an appeal against conviction if the appellant satisfies the Court that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence. The principles governing an appeal on this basis were recently addressed by the High Court in *R v Baden-Clay*:[22]

> 1 It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact'.[23] Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect,[24] the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.[25] ...
>
> 2 With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.[26]

102 This means that the question is whether the jury 'must', as distinct from 'might', have entertained a doubt about the guilt of the accused based on the whole of the evidence before it.[27]

22 (2016) 90 ALJR 1013, 1023–4 [65]–[66] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

23 *Hocking v Bell* (1945) 71 CLR 430, 440 (Latham CJ). See also *Brennan v The King* (1936) 55 CLR 253, 266 (Dixon and Evatt JJ); *Sparre v The King* (1942) 66 CLR 149, 154 (Starke J); *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, 188 (Murphy J); *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 601 (Brennan J); *MacKenzie v The Queen* (1996) 190 CLR 348, 365 (Gaudron, Gummow and Kirby JJ); *MFA v The Queen* (2002) 213 CLR 606, 621 [48] (McHugh, Gummow and Kirby JJ).

24 *Kingswell v The Queen* (1985) 159 CLR 264, 301 (Deane J); *Brown v The Queen* (1986) 160 CLR 171, 201 (Deane J); *Katsuno v The Queen* (1999) 199 CLR 40, 63–4 [49] (Gaudron, Gummow and Callinan JJ); *Cheng v The Queen* (2000) 203 CLR 248, 277–8 [80] (Gaudron J); *Alqudsi v The Queen* (2016) 90 ALJR 711, 715 [2], 718 [16] (French CJ), 753 [195] (Nettle and Gordon JJ).

25 *M v The Queen* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ); *MFA v The Queen* (2002) 213 CLR 606, 621–2 [49]–[51], 623 [56] (McHugh, Gummow and Kirby JJ).

26 *M v The Queen* (1994) 181 CLR 487, 494–5. See also *R v Hillier* (2007) 228 CLR 618, 630–1 [20] (Gummow, Hayne and Crennan JJ) and the authorities cited.

27 *M v The Queen* (1994) 181 CLR 487, 492–3; *Libke v The Queen* (2007) 230 CLR 559, 596–7 (Heydon J).

103 In a circumstantial case such as the present, this test must be applied bearing in mind also the reasoning process appropriate to such cases. Again, the High Court

104 summarised the relevant principles in *R v Baden-Clay*:[28]

> 3 The principles concerning cases that turn upon circumstantial evidence are well settled.[29] In *Barca v The Queen*,[30] Gibbs, Stephen and Mason JJ said:
>
> > When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v The King*.[31] To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v The Queen*;[32] see also *Thomas v The Queen*.[33]
>
> 4 For an inference to be reasonable, it 'must rest upon something more than *mere conjecture*. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence'.[34] Further, 'in considering a circumstantial case, *all of the circumstances* established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence'.[35] The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal.[36]
>
> 5 Further, a criminal trial is accusatorial but also adversarial. Subject to well-defined exceptions, 'parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue'.[37]

105 In applying these principles to the present case, it is essential to bear in mind precisely how the Crown put its case at trial. It alleged that the paintings which

28 (2016) 90 ALJR 1013, 1020–1 [46]–[48] (emphasis in original).

29 *Barca v The Queen* (1975) 133 CLR 82, 104.

30 Ibid.

31 (1911) 13 CLR 619, 634 (Griffith CJ).

32 (1963) 110 CLR 234, 252 (Menzies J).

33 (1960) 102 CLR 584, 605–6 (Windeyer J).

34 *Peacock v The King* (1911) 13 CLR 619, 661 (O'Connor J), quoted in *Barca v The Queen* (1975) 133 CLR 82, 104.

35 *R v Hillier* (2007) 228 CLR 618, 637 [46] (citations omitted) (Gummow, Hayne and Crennan JJ).

36 Ibid 638 [48]. See also *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 535 (Gibbs CJ and Mason J).

37 *Nudd v The Queen* (2006) 80 ALJR 614, 618 [9] (Gleeson CJ). See also *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ); *Doggett v The Queen* (2001) 208 CLR 343, 346 [1] (Gleeson CJ).

Gant sold had been created by Siddique in the style of Brett Whiteley, between 2007 and 2009, and that they had been painted by Siddique with the intent that they be passed off as genuine Whiteleys. The defence, or at least Siddique, did not dispute at that time having created three paintings in the style of Whiteley, but denied the joint criminal enterprise alleged.[38] For that reason, the existence of genuine works by Whiteley meeting the description of the paintings in issue, even if Siddique had later made copies of them, would have been fatal to the Crown case.

106 The question before this Court reduces to whether the only rational inference which a reasonable jury could draw, based on all the evidence, was that the three paintings were created by Siddique in the period after mid-2007 rather than having been painted by Whiteley and acquired by Gant in 1988. While there was certainly evidence which could support the conclusion that Siddique created the paintings in 2007 to 2009, using *View from the Sitting Room Window, Lavender Bay* as a template, if the jury were to convict, they needed to find beyond reasonable doubt, on the whole of the evidence, that the paintings had not existed before 2007. That meant, in particular, that the jury could only convict if satisfied that both Milburn and James were entirely mistaken in their evidence of having seen *Blue Lavender Bay* and *Orange Lavender Bay* in 1988 and 1989 respectively.[39] Otherwise, there was available a rational inference from that evidence inconsistent with the Crown case and therefore inconsistent with verdicts of guilty.

107 As the Director properly conceded before this Court, there was simply no evidence to support the conclusion that Milburn and James were so fundamentally mistaken. The suggestion that they may have been had not been put to either witness. The Crown case was, moreover, that each witness, and especially James, was mistaken in a number of critical respects. Further, while a jury is not obliged to accept even the unchallenged evidence of a witness, in this case, for them to have done so required

[38] It may also be noted that the Crown did not allege, in the alternative, that Siddique may have created the works without the intention of having them sold as genuine Whiteleys, but that Gant subsequently embarked on that course independently. If that were the true situation, the case of joint criminal enterprise, as outlined to the jury, would also have failed.

[39] Hartley's evidence of having seen *Blue Lavender Bay* was less cogent, given that he was unable to be specific about the period during which he had done so.

discounting not just the oral testimony, but documentary evidence that unequivocally and powerfully supported that testimony. Far from providing a basis for rejecting their evidence, the contemporaneous documentation tended to confirm its reliability.

108 In the case of Milburn, the consignment note supported her recollection. There was no reason beyond mere speculation to view that note with suspicion. Inexplicably, the Crown seems not to have subjected it to any kind of expert evaluation. At least to the untrained eye, it appears to be in the same handwriting as other entries in the book. No reason appears for rejecting Milburn's unequivocal evidence that the writing was her own.

109 In relation to James, both the catalogue and the running proof supported his evidence in respect of *Orange Lavender Bay* and, therefore, his account of photographing both it and *Blue Lavender Bay*. Again, no expert analysis of these documents, or the handwritten notations in the proof, was undertaken on behalf of the Crown. Moreover, the unchallenged evidence as to the events said to have led to the cancellation of the 'A Private Affair' exhibition itself affords a compelling explanation for the very limited production of the catalogue. In the circumstances, there is no reason not to accept its authenticity.

110 In the end, these matters stood as 'solid obstacle[s]'[40] to accepting the Crown case unless there was a rational basis for concluding that both Milburn and James were fundamentally mistaken in their evidence, and that both the entry in the consignment book and the catalogue and running proof had somehow, and by someone unnamed, been fraudulently created. Especially in the absence of any expert evidence regarding the documents, there was simply no basis for the jury to have reached that conclusion.

111 These matters by themselves meant that there must have been a reasonable doubt as to the guilt of the applicants. Reference may be added to the evidence of the quote of

[40] *R v Klamo* (2008) 18 VR 644, 654 [40] (Maxwell P; Vincent JA agreeing), quoting *R v Shah* [2007] SASC 68 [4] (Doyle CJ).

Siddique for revarnishing *Blue Lavender Bay* in 2006 and Hartley's evidence of having seen that painting several times at Siddique's studio at about the same time. It must also be borne in mind that the expert evidence fell well short of an opinion that *Blue Lavender* Bay or *Orange Lavender Bay* were not painted by Whiteley. In all the circumstances, as senior counsel for the Director properly accepted, there is a significant possibility that innocent men were convicted.[41]

112 For these reasons, each of the convictions was unreasonable and cannot be supported having regard to the evidence, within the meaning of s 276(1)(a). On that basis, we ordered that the convictions be set aside and that verdicts of acquittal be entered.

113 So to conclude is not to say that the prosecution ought not to have been brought. Nor does it follow that the judge erred in rejecting the no case submissions that were made at trial (in respect of which rulings no challenge has been made).

114 However, it is unfortunate, to say the least, that the manner in which the Crown case was conducted demanded *Browne v Dunn* directions in respect of the evidence of Milburn and James. We have not been privy to the reasons which led the prosecutor to approach their evidence as she did. Nor can we guess at them. The result was that, notwithstanding the judge's directions in respect of that evidence, the jury were left effectively to speculate about the import of the evidence of these two critical witnesses. Such speculation, which the prosecutor effectively invited by the manner in which she couched her closing address to the jury, may well have contributed to the error in the jury's verdict.

115 It is not necessary to pursue this possibility. Nor is it useful now to contemplate how the Crown case, or the police investigation, might have been conducted differently. The critical point is that, as we have explained, the jury were bound to reject the Crown case as advanced before them, and to acquit both the accused.

[41] See *M v The Queen* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

116 The Crown chose to present this case on a narrow and quite specific basis. It alleged that the paintings shown in Morel's photographs, so obviously done by Siddique between 2007 and 2009, were subsequently offered for sale by Gant. The Crown nailed its colours to the mast in that particular respect. Once the defence was able to point to the reasonable possibility that the paintings offered for sale by Gant had come into existence at any time prior to 2007, that was effectively the end of the prosecution case, as it was run.

117 It will be seen that our reasoning in no way depends upon this Court making any affirmative finding that the paintings offered for sale were painted by Brett Whiteley. To be clear, we make no such finding. Nor are we equipped to do so.

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